

B-170012

MAR 14 1972

Dear Senator Talmadge:

Reference is made to your letter of January 27, 1972, transmitting correspondence from Mrs. Beatrice B. Pendergrass relative to her request for relief from liability to the Government for the loss of \$250 of Government funds for which she was accountable, and requesting that we reconsider her situation.

The facts in this matter are fully set forth in our prior decisions herein, B-170012 dated August 11, 1970, and May 3, 1971, and need not be repeated in detail here. A copy of each of the cited decisions is enclosed for your information. Briefly, one Mr. Heriberto A. Trevino, an employee of the National Communicable Disease Center (NCDC), Lawrenceville, Georgia, Health Services and Mental Health Administration, where Mrs. Pendergrass was a Class "B" Cashier, was issued an advance of \$250 cash and a \$500 check for emergency travel. Upon postponement of his travel, Mr. Trevino was ordered by the Administrative Office, Epidemiology Program, on September 5, 1969, to return his passport, the check, and the \$250 cash advance to the CDC Clifton Road facility for safekeeping. The order was received late on a Friday afternoon and, hence, there was no convenient way to comply but, since there was a safe at the Lawrenceville facility (Mrs. Pendergrass' safe), it was agreed that the items in question should be turned in there, and Mr. Trevino did so, on Monday, September 8, 1969. Mrs. Pendergrass counted the currency in the presence of Mrs. Peggy Hayes of the Lawrenceville facility, and placed it in the centerfold of the passport together with the check, placed all items in an envelope and then put the envelope with its contents in the safe. Mrs. Pendergrass did not examine the envelope again until October 1, 1969, when Mrs. Hayes came to pick it up. When the envelope was opened, the cash was gone while the check and passport were still there. The contents of the safe were thoroughly examined but the cash was not found, although no other moneys were missing from the safe. Proper officials were notified, including the FBI and the Gwinnett County Sheriff's Office, but no trace of the missing cash was found, nor could the FBI or the Sheriff's Office determine how it was taken. The request for relief of Mrs. Pendergrass was denied by our decision of August 11, 1970, B-170012, and upon request for reconsideration relief was again denied by our decision of May 3, 1971, B-170012.

The principal contentions upon which Mrs. Pendergrass bases her request for relief are that the funds in question were not public funds but were the personal funds of Mr. Trevino; that she was not a collection officer

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and was not specifically directed by supervisory personnel to accept said funds; and that there is no positive or affirmative evidence of negligence on her part in connection with this loss. All of these contentions were carefully considered in reaching our prior decisions in this matter.

As we have stated in our prior decisions, the funds here in question were public funds. The missing \$250 consisted of public funds advanced to Mr. Trevino for travel expenses, which he, under specific orders, returned to Mrs. Pendergrass for safekeeping. While it has been held that public funds lose their identity as public funds when advanced to a Federal employee as travel funds and become the employee's personal funds to be accounted for by him, it is obvious that when such funds, upon specific orders, are returned to the custody of a Government cashier and placed in a Government safe--as in the present instance--they regain their status as public funds which must be accounted for by their official custodian. It certainly could not be argued that Mr. Trevino must be held accountable for funds which disappeared from the official repository where he was officially directed to deposit them.

While Mrs. Pendergrass may not officially have been classified as a collection officer, the incident here involved was not a "collection" in the usual sense, that is, receipt of money from the public, but was merely the return to Government custody of Government funds. Mrs. Pendergrass' position description included the duties of a Class "B" Cashier, the duties and responsibilities for which are set forth in the "Manual of Procedures and Instructions for Cashiers" issued by the Department of the Treasury. Section 0402 of said manual provides: "Cashiers are personally liable for all moneys coming into their possession and are bonded to insure faithful performance of their duties." (Underscoring supplied.) Section 521 of title 31, United States Code, provides in pertinent part that:

"* * * all public officers of whatsoever character, are required to keep safely, * * * all the public money collected by them, or otherwise at any time placed in their possession and custody * * *." (Underscoring supplied.)

It seems obvious from the above that Mrs. Pendergrass was responsible for any public money "placed in her possession and custody," regardless of whether she was officially classified as a "collection officer." In connection with Mrs. Pendergrass' contention that she was not specifically directed by supervisory personnel to accept the funds, it is apparent that the specific direction to Mr. Trevino to turn the funds over to her constituted at least an implied instruction to her to accept them.

We agree that there is no positive or affirmative evidence of negligence on the part of Mrs. Pendergrass in connection with this loss. However, we have repeatedly held that positive or affirmative evidence of negligence is not necessary, and that the mere fact that an unexplained shortage occurred is, in and of itself, sufficient to raise an inference or presumption of negligence. A Government official charged with the custody and handling of public moneys is expected to exercise the highest degree of care in the performance of his duty and, when funds disappear without explanation or evident reason, the presumption naturally arises that the responsible official was derelict in some way. Moreover, granting relief to Government officials for unexplained losses or shortages of this nature might tend to make such officials lax in the performance of their duties. 48 Comp. Gen. 566 (1969), and cases cited therein.

Since the loss here involved is completely unexplained, we are faced with a presumption of negligence, and no evidence whatsoever to rebut that presumption, other than the fact that Mrs. Pendergrass has been employed by the Government for a number of years and has had no previous shortages or losses. In the case of Hoggs v. United States, 44 Ct. Cl. 367 (1909), the court stated on page 384, in connection with an accountable officer's petition for relief, that:

"* * * That is, where the officer has established the fact that his conduct has really been faultless. Before relief can be granted it must appear with reasonable degree of certainty from all the proof and circumstances of the case that the officer entrusted with public money has exercised watchfulness over the funds and such degree of care as fairly and equitably entitle him to a decree exonerating him from the obligation of his bond.

"* * * Each case must depend upon those conditions and circumstances which necessarily arise out of the proof when presented. As, however, redress can only be had in exceptional cases there is at the outset a presumption of liability, and the burden of proof must rest upon the officer who has sustained the loss." (Underscoring supplied.)

Mrs. Pendergrass has noted that while she requested relief under the provisions of section 1 of the act of August 1, 1947, as amended by the act of August 9, 1955, 31 U.S.C. 22a-1, the above case and others cited in our prior decisions were decided far prior to those dates, and has stated her belief that such cases were irrelevant to the case at issue. However, the

above case involved R.S. 1059 and 1062 (now 28 U.S.C. 1496 and 2512), which authorized the Court to grant relief to a disbursing officer where it determined the loss to have been without fault or negligence on the part of the officer. The legal principle enunciated therein clearly is equally applicable to cases under 31 U.S.C. 82a-1.

It was apparent at the time of our prior decisions herein that Mrs. Pendergrass had not met the burden of proof, and there is nothing contained in the current request from her forwarded by you which would warrant any change in our prior determinations.

We regret that we are unable to reach a determination more favorable to your constituent.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

Enclosures

The Honorable Herman E. Talmadge
United States Senate